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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 443

TITUSVILLE DAIRY PRODUCTS COMPANY, PETITIONER

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported[1] in 77 F. Supp. 232. The opinion of the United

[1] The opinion of the District Court also appears (R. 17–26) in what the petitioner refers to (Pet. 2) as the "record of the present proceedings" which accompanied the petition for a writ of certiorari. This "record" referred to by the petitioner is merely the appendix to the brief for the Secretary of Agriculture in this case in the United States Court of Appeals for the Third Circuit, plus the opinion and judgment of the Court of Appeals. Although the appendix to the Secretary's brief in the Court of Appeals did not include or constitute the entire record in the case, our references herein to the appendix are indicated as being to the record.

States Court of Appeals for the Third Circuit (R. 482–488), as amended (R. 489), is reported in 176 F. 2d 332.

JURISDICTION

The judgment of the Court of Appeals was entered August 4, 1949 (R. 488–489). The petition for a writ of certiorari was filed on November 1, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether under Department of Agriculture Order No. 27 (the New York Milk Order), issued pursuant to the Agricultural Marketing Agreement Act of 1937, the petitioner's surplus milk approved by the health authorities for marketing in New York City is subject to regulation, irrespective of actual shipment of such milk in interstate commerce.

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601 *et seq.*), which reenacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended.

The order involved is Federal Order No. 27, regulating the handling of milk in the New York metropolitan marketing area. It was issued on August 5, 1938, effective September 1, 1938 (3 F. R. 1945, 1957, 2100, 2102; 7 CFR, 1938 Supp.,

927). It was suspended (4 F. R. 1259, 2377) during the period January 31, 1939, to July 1, 1939.[2] The order, as amended and reissued with amendments from time to time, is now in effect (7 CFR, 927.1). The order is not printed in the record but its pertinent parts are quoted or summarized in this brief. The method of determining the uniform price under the order and the operation of the producer-settlement fund or equalization pool are described in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, sustaining the validity of the Act and the order.

STATEMENT

The petitioner, Titusville Dairy Products Co. ("Titusville"), operated at all times between September 1, 1938 and January 16, 1942, a plant at Titusville, Pennsylvania, where it processed and distributed milk received from producers in Pennsylvania. At some time prior to September 1, 1938, Titusville had applied for and received from the New York City Health Department approval as a plant from which milk might be shipped into New York City for consumption and distribution, and it retained this approval during the entire period in question. (R. 21.) During the period between September 1, 1938 and October 5, 1941, the petitioner shipped substantial

[2] The suspension was in connection with the litigation which culminated in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533.

quantities of milk or cream into the New York Milk Marketing Area (the "Area") and sold its surplus milk to customers in Pennsylvania.[3] (R. 21–23.)

On September 1, 1938, Department of Agriculture Order No. 27, governing the milk industry in the Area and designed to insure the payment by handlers of a uniform price to producers, became effective. (R. 21–22.) The Order, the purpose and operation of which are described in detail in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (which sustained the validity of the Act and the Order), established a producer-settlement fund to equalize the cost of milk to handlers and provided for administrative assessments. It defined a "handler" as "any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area, which handling is in the current of interstate commerce. * * *" (R. 21–22.)[4] From Sep-

[3] "Surplus" milk, under the scheme of the Order, is that which is surplus to the requirements of the New York Area for fluid milk or cream. Such milk might be sold elsewhere as fluid milk or cream or be made into milk products (butter, cheese, etc.) for sale in the New York Area or elsewhere.

[4] Prior to May 1, 1940, the Order further provided that "This definition shall not be deemed to include any person who neither received milk from producers nor handles milk which is sold as milk or cream in the marketing area." By amendment of that date, this sentence was deleted. (R. 22.)

tember 1, 1938, to July 1, 1941, the petitioner recognized that its handling of milk at the Titusville plant was subject to the Order. During that period it paid the administrative assessments to the Market Administrator on milk received at its plant, submitted detailed reports as a handler in connection with the classification and pricing of milk under the Order, and received $55,213.25 from the producer-settlement or equalization pool.[5] (R. 22.)

After October 5, 1941, the petitioner shipped no milk or cream into the Area, but gave no notice to this effect to any official body. On November 22, 1941, the petitioner wrote the Market Administrator, asking as to the procedure for withdrawal from the New York milk pool, and the Administrator on November 25 replied (R. 271) that the procedure was to relinquish the approval of its plant by the New York City Board of Health. More than a month later, on January 13, 1942, the petitioner requested the New York City Board of Health to cancel the approval of its plant. The Board did as requested on Jan-

[5] Prior to March 1, 1941, the petitioner was subject to the provisions of the Order only to the extent that it shipped fluid milk or cream into the area. On that date, however, the Order was so amended that all milk received at a "handler's" plant was priced and pooled under the Order, regardless of where sold. See fn. 8, pp. 11-12, *infra*. Under this amendment, Titusville, which shipped into the Area less than half the milk received at its plant, became a contributor to, rather than a recipient from, the producer-settlement fund. (R. 23–24, 483–484.)

uary 16 (R. 281), and the Administrator immediately recognized the cancellation as ending the petitioner's status as a "handler" under Order No. 27.

The petitioner did not pay any sums into the producer-settlement fund after July 1, 1941, although it continued to ship substantial quantities of cream into the New York Area until October 5 (R. 22–23, 50–51) and filed reports as a handler under the Order until January 16, 1942, which reports indicated that it owed money to the fund (R. 23, 51).

This proceeding was initiated by the filing of a petition under § 8c (15) (A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U. S. C. 608c (15) (A)), requesting the Secretary of Agriculture to hold a hearing on the claims of petitioner and to reverse the action of the Market Administrator in deciding that all of the petitioner's milk was subject to regulation during the period in controversy. (R. 33–47.) This section of the Act provides for a hearing on any petition filed by a handler with respect to an order or obligation thereunder which the handler asserts is "not in accordance with law." *United States* v. *Ruzicka,* 329 U. S. 287. The ruling of the Judicial Officer[6] on the petition is "final, if in ac-

[6] The Judicial Officer acted for the Secretary of Agriculture of the United States pursuant to the authority delegated (10 F. R. 13769) under the Act of April 4, 1940, 54 Stat. 81, 5 U. S. C. 516a *et seq.*, which provides that whenever a

cordance with law" (7 U. S. C. 608c (15) (A)). Jurisdiction is conferred on the district courts to review a ruling of the Judicial Officer upon the institution of such action by the handler.

The Judicial Officer, holding that the petitioner was a handler and that all of its milk was subject to regulation during the entire period in controversy, dismissed the petition. (R. 60.) The District Court affirmed the decision of the Judicial Officer that the petitioner was subject to regulation as a handler with respect to all of its marketing of milk during the period July 1, 1941, to October 5, 1941, but, holding that the petitioner was not a handler with respect to any of its marketing transactions during the period October 5, 1941, to January 16, 1942, reversed the ruling with respect to that part of the period in controversy. (R. 17–28.) The United States Court of Appeals for the Third Circuit reversed the District Court and affirmed the decision of the Judicial Officer by holding that the petitioner was subject to regulation, under the order, with respect to all of its marketings of milk until the petitioner's plant on January 16, 1942, ceased to be an approved source of supply for New York City. (R. 482–489.)

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delegation is made under the statute "all provisions of law shall be construed as if the regulatory function or the part thereof delegated had (to the extent of the delegation) been vested by law in the individual to whom the delegation is made, instead of in the Secretary of Agriculture."

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ARGUMENT

The court below correctly determined that Titusville was a "handler" within the scope of Order No. 27 so long as it retained the approval which it had secured from the New York health authorities and so remained an eligible and potential seller of fluid milk in the Area; and that the Order as so construed did not exceed the Secretary's authority, even though some of the petitioner's milk was surplus to the requirements of the Area prior to October 5, and all of it was surplus thereafter. (R. 485–488.)

This Court has heretofore recognized that adequate stabilization of the milk market in the New York Marketing Area requires regulation not only of that milk which is actually sold there as fluid milk or cream, but also of "surplus" milk—*i. e.*, that milk which is handled by suppliers approved for distribution in the Area but which, being surplus to the actual demand of the Area for fluid milk, must either be sold elsewhere as fluid milk or processed into milk products.[7]

[7] The Court stated in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 549–550: "The problems concerned with the maintenance and distribution of an adequate supply of milk in metropolitan centers are well understood by producers and handlers. In the milkshed and marketing area of metropolitan New York these problems are peculiarly acute. It is generally recognized that the chief cause of fluctuating prices and supplies is the existence of a normal surplus which is necessary to furnish an adequate amount for peak periods of consumption. This results in an excess of production during the troughs of

United States v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533; *Nebbia* v. *New York*, 291 U. S. 502. The chief cause of disorderly marketing is the

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demand. As milk is highly perishable, a fertile field for the growth of bacteria, and yet an essential item of diet, it is most desirable to have an adequate production under close sanitary supervision to meet the constantly varying needs. The sale of milk in metropolitan New York is ringed around with requirements of the health departments to assure the purity of the supply. Only farms with equipment approved by the health authorities of the marketing area and operated in accordance with their requirements are permitted to market their milk. * * * Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less nonperishable products. Since these manufactures are in competition with all similar dairy products, the prices for the milk absorbed into manufacturing processes must necessarily meet the competition of low-cost production areas far removed from the metropolitan centers. The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market. It is obvious that the marketing of fluid milk in New York has contacts at least with the entire national dairy industry. The approval of dairies by the Department of Health of New York City, as a condition for the sale of their fluid milk in the metropolitan area, isolates from this general competition a well recognized segment of the entire industry. Since these producers are numerous enough to keep up a volume of fluid milk for New York distribution beyond ordinary requirements, cut-throat competition even among them would threaten the quality and in the end the quantity of fluid milk deemed suitable for New York consumption. Students of the problem generally have apparently recognized a fair division among producers of the fluid milk market and utilization of the rest of the available supply in other dairy staples as an appropriate method of attack for its solution. Order No. 27 was an attempt to make effective such an arrangement under the authority of the Agricultural Marketing Agreement Act."

existence of the surplus milk (*United States* v. *Rock Royal Co-operative, Inc., supra,* at 307 U. S. 549); so long as the surplus burden "is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor." *Nebbia* v. *New York, supra,* at 291 U. S. at 518.

The Order in question regulates the handling of all milk which may, because handled by a plant having the approval of the health authorities, be sold in the Area; the definitions of "producer" and "handler" identify the milk and the persons to be regulated. This Court in *United States* v. *Rock Royal Co-operative, Inc., supra,* described the ambit of the Order as follows (307 U. S. at 554):

> By the Order the marketing area is defined as the City of New York and the counties of Nassau, Suffolk and Westchester. A producer is any person producing milk delivered to a handler at a plant approved by a health authority for the receiving of milk for sale in the marketing area. A handler is a person engaged in the handling of milk or cream received at an approved plant for similar sale. * * *

The economic necessity for regulating all of the milk received from producers at plants having health department approval for receiving milk for sale in the New York metropolitan marketing area is apparent from the uncontroverted facts. Any of the milk at such a plant is in economic

competition with all other milk at similar plants. There is complete homogeneity of the entire supply of milk approved by the health authorities for sale in fluid form in the marketing area. The economic considerations and the health or sanitary requirements are, in this respect, inextricably interlaced. The approval of the milk plants by the health authorities "as a condition for the sale of * * * fluid milk in the metropolitan area, isolates from * * * general competition a well-recognized segment of the entire industry." *United States* v. *Rock Royal Co-operative, Inc., supra,* at 307 U. S. 550.

If the Order were restricted, as the petitioner contends (Pet. 4) it should be restricted, to the milk or cream actually shipped to the marketing area, the acute problem as to the surplus milk would remain unresolved. Only by making the Order apply to all of the approved milk, including the surplus milk, could the Secretary, on the basis of the evidence, conclude under § 8c (4) and § 8c (18) of the Act that the Order would achieve the economic goal set forth in the statute. The delimitation of the scope of the order is based on the evidence in the hearing record, evidence which, insofar as it relates to the issues in this case, is not only substantial but almost entirely uncontroverted.[8]

[8] The petition and brief in support thereof do not refer to any evidence in the record in support of the petitioner's con-

As to the channels of commerce in milk for the marketing area, the Secretary found (3 F. R. 1946):

> That approximately one-third of the milk produced for sale in the marketing area is produced in States other than the State of New York; that approximately one-third of the milk produced in the State of New York for sale in the marketing area passes through other States on its way to be sold in the marketing area; and that milk produced in the State of New York for sale in the marketing area which does not pass through other States on its way to be sold in the marketing area is physically and inextricably intermingled with that milk which is produced outside the State of New York for sale in the marketing area or which is produced in the State of New York for sale in the marketing area but which passes through other States on its way to be sold in the marketing

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tention that its surplus milk should be free from regulation. The petitioner fails to assert an absence of substantial evidence to support the Order. Moreover, the immediate and increasing need for regulating the surplus milk, as well as the milk disposed of on the fluid milk market, in the marketing area, became so pronounced that the order was amended (5 F. R. 4970, 6 F. R. 1181) effective March 1, 1941, on the basis of evidence (e. g., R. 467–472) at the amendment hearing, so as to provide that all milk received at an approved plant is priced under the order regardless of whether the milk is disposed of in the marketing area, or outside the marketing area, for fluid use or as surplus milk for manufacturing purposes. Prior to that amendment all of the milk was regulated in some respects, but not in all respects.

area; and that *all milk which is produced for sale in the marketing area is handled in the current of interstate commerce or so as directly to burden, obstruct, or affect interstate commerce in milk and its products.* [Emphasis supplied.]

The record shows (R. 365) that approximately 17% of the milk sold in the marketing area comes from Pennsylvania.

The definition of "handler," as set forth in the Order, includes[9] any person who engages in the handling of milk or cream therefrom, "which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area, which handling is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce."[10]

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[9] The petitioner was unequivocal, at the hearing on its petition, that (R. 193): "There is no question about what the order purports to regulate. We quite agree that the order, as written, attempts to regulate all the milk that flows through the plant that has a New York City or New York State health permit, regardless of where the milk is purchased or where the milk is sold. * * * We are not questioning what the order says."

[10] Plant approval is not thrust on any handler. The handler voluntarily applies for and maintains approval by the health department and may voluntarily obtain the cancellation of the approval at any time. The petitioner's status as an approved plant was promptly cancelled on its request for cancellation (R. 281). The reference, in the definition of handler in the order, to health department approval thus merely specifies that milk which is in the channel of commerce to be regulated under this marketing order; there is no delegation of legislative power to the local health authorities.

The proposed Order on which the original promulgation hearing was held contained a definition of "handler" which set forth two conditions, *i. e.,* a person who receives and disposes of milk at a plant approved by any health authority for the shipment of milk to the marketing area, *and* "who engages in such handling of milk or cream as is in the current of interstate commerce" (R. 412–413). On the basis of the evidence at the hearing on the proposed program, the definition of "handler" was revised so as to omit the conjunction and thereby eliminate the second condition. As revised, the definition of "handler" refers only to plants approved by any health authority, and then states that the handling of milk in any such plant is in interstate commerce or directly affects, burdens, or obstructs interstate commerce. The definition of handler containing only one condition is, therefore, in accord with the finding of fact by the Secretary that all milk, including the surplus milk, which is eligible for sale in the marketing area is handled in the current of interestate commerce or so as directly to burden, obstruct, or affect interstate commerce in milk and milk products. As the court below put it, the proposed Order was rephrased "so as to make the second item merely explanatory of the first; for it was felt that, wherever [health] departmental approval was had, of necessity the milk was in the current of interstate commerce or that in any event interstate commerce was af-

fected." (R. 487.) Assuming, *arguendo,* that the definition of handler states two conditions, *i. e.,* plant approval *and* handling that is in interstate commerce or directly affects such commerce, there is nothing in the record inconsistent with the Secretary's conclusion that the marketing of surplus milk, approved by the health authorities for sale in the marketing area, is in interstate commerce or directly affects such commerce. The evidence in support of the Secretary's conclusion is abundant (*e. g.,* R. 305–319; 357–358; 430–431).

The questions presented (Pet. 2–3) by the petitioner have been settled by this Court. The statute confers on the Secretary "the full reach of the commerce power" under the Federal Constitution. *United States* v. *Wrightwood Dairy Co.,* 315 U. S. 110, 123. The language of the statute and the provisions of Order No. 27 are to be given the full scope of their constitutional counterpart; and all milk, including surplus milk, approved by the health authorities for sale in the marketing area is in interstate commerce or directly affects, burdens, or obstructs interstate commerce. *United States* v. *Rock Royal Co-operative, Inc.,* 307 U. S. 533.

There is no merit in the petitioner's assertion (Pet. 8) that the decision below is in conflict with *Chassaniol* v. *City of Greenwood,* 291 U. S. 584, which held that the commerce clause of the Federal Constitution did not prevent a state from

levying an occupational tax on the brokerage of cotton which was ultimately shipped in interstate commerce. Liability to state taxation is no indication of immunity from Federal regulation under the commerce clause. *Stafford* v. *Wallace,* 258 U. S. 495, 525–527; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 311. The petitioner also contends (Pet. 8) that the decision below conflicts with *Carter* v. *Carter Coal Co.,* 298 U. S. 238, because "the actual facts" concerning transactions in commerce "determine what does and what does not affect interstate commerce." The instant case certainly presents no conflict with this undisputed principle. The actual facts were considered and analyzed at a protracted public hearing on the proposed program to regulate the handling of milk in the marketing area; the issues have been considered again at hearings on amendments; and the petitioner does not question the adequacy of evidence to support the Secretary's findings of fact that the regulation of all milk, including surplus milk, approved for the marketing area is necessary to effectuate the purpose of the Act.

The petitioner also asserts (Pet. 9) that the decision below conflicts with the decision in *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346. That case deals with a different situation. As explained by the Court (306 U. S. 346, 351), the question there presented was "whether, *in the absence of federal regulation,* the enforce-

ment of the [State] statute is prohibited by Article I, § 8 of the Constitution" (emphasis supplied). Here there was no absence of Federal regulation. Moreover, the petitioner refers to nothing—and there is nothing—in the record to show any conflict between the state and federal regulation of milk marketing. But even if there were, the Federal regulation would prevail. *Minnesota Rate Cases,* 230 U. S. 352, 398–433; *Napier* v. *Atlantic Coast Line Railroad Co.,* 272 U. S. 605; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148; *Hill* v. *Florida,* 325 U. S. 538; *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767; *Rice* v. *Sante Fe Elevator Corporation,* 331 U. S. 218.

CONCLUSION

The decision of the court below is correct and is not in conflict with any decision of this Court or any other court of appeals. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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